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No. 09-252

Supreme Court, U.S.
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In The Supreme Court of the United States

JOHN GERARD QUINN,

Petitioner,

v.

JOHN ROACH, GAIL LEYKO, MANUEL GONZALES, CURTIS HOWARD, KRISTI TYLER, MICHELLE VOIRON, JOSE QUILES, COLLIN COUNTY, TEXAS, AND THE CITY OF MCKINNEY, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of the numerous and inexcusable misrepresentations of the record by Petitioner and the lack of significant issues of law presented by this case, this Court should waste its limited resources by granting Petitioner's request to review the unanimous, unpublished opinion of the Fifth Circuit.

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SUMMARY

This case raises no new issues regarding the application of the Fourth Amendment or qualified immunity. Twenty judges have had the opportunity to review Officer Quiles' conduct and the warrant that led to Petitioner's arrest and none of them have concluded that Petitioner's Fourth Amendment rights were violated or that Officer Quiles' conduct violated clearly established law.

The state court magistrate held that there was probable cause to arrest Petitioner for the alleged rape of Petitioner's daughter based on the facts then known to Officer Quiles. Both the United States magistrate judge and the United States district court judge agreed that there was, at the very least, arguable probable cause to arrest Petitioner. They both further found that there was no evidence to suggest that Officer Quiles concealed exculpatory information from the state court magistrate.

In turn, a three-judge panel of the Fifth Circuit unanimously upheld the district court's decision. The three-judge panel considered its decision to be so routine and mundane as not to merit publication.

Finally, as a result of Petitioner's filing of a petition for rehearing *en banc*, the remaining fourteen judges in regular active service had an opportunity to review this matter. Out of a total of seventeen Fifth Circuit judges, not a single one requested that the Fifth Circuit be polled on Petitioner's petition for rehearing *en banc*. The twenty judges who

have had the opportunity to review this case have been in unanimous agreement: this is a routine, mundane case in which an officer had, at the very least, arguable probable cause to present his request for an arrest warrant to a neutral, detached magistrate. This case does not present any issues worthy of this Court's review.

Remarkably, Petitioner tries to paint the Fifth Circuit as some sort of rogue court which has a long-established custom of ignoring this Court's precedents with respect to the application of qualified immunity. Petitioner's portrait of the Fifth Circuit is surreal. It is based on misrepresentations of the record, misrepresentations of the Fifth Circuit's opinion below, misrepresentations of previous Fifth Circuit opinions and misrepresentations of opinions from other federal courts.

Officer Quiles signed an affidavit in support of his application for an arrest warrant. The state magistrate reviewed the application, found probable cause to exist, and issued the arrest warrant. Petitioner's arrest was the end result of an investigation into rape allegations initially made by Petitioner's daughter to her mother in the course of the daughter's suicide attempt. Those allegations were repeated with more particularity to a nurse and a social worker during interviews. The daughter's allegations were first made to her mother at home, next made to a nurse at the hospital and finally repeated in a more particularized way (on videotape) to a trained social worker at the local children's

advocacy center. That trained social worker referred the matter to the police. Officer Quiles responded to the referral by reviewing the materials and documents and reviewing the videotaped interview. After that, Officer Quiles interviewed and took a written statement from the victim's mother, obtained a document allowing him to obtain the victim's medical records and obtained an affidavit from the nurse who heard one of the outcry statements. Armed with all of this information, Officer Quiles approached the state court magistrate to request an arrest warrant. After considering the evidence, the magistrate issued an arrest warrant for Petitioner.

Ignoring the evidence, Petitioner contends that Officer Quiles violated Petitioner's clearly established Fourth Amendment rights by applying for the arrest warrant. First, Petitioner contends that the restrictions applicable to anonymous informants should apply to victim eyewitnesses. More specifically, Petitioner contends that, as a matter of law, the testimony of a victim eyewitness cannot serve as a sufficient basis for probable cause to arrest without supporting evidence. However, the lower federal courts, like this Court, have recognized that the testimony of an eyewitness, particularly the victim of an alleged crime, is entitled to greater credence than informants.

Second, Petitioner contends that Officer Quiles should not have relied on the testimony of Petitioner's daughter because she may have had a motive to lie. The undisputed summary judgment evidence

established that, at the time, Officer Quiles was not aware of any evidence which called into question the credibility of Petitioner's daughter.

Third, perhaps recognizing that the summary judgment evidence demonstrates that Officer Quiles is entitled to summary judgment, Petitioner argues that courts should not consider the evidence when deciding qualified immunity – even if qualified immunity is asserted in a motion for summary judgment. Petitioner contends that when qualified immunity is asserted in the context of a motion for summary judgment, the court should look only to a plaintiff's allegations and not to the evidence. Respondent is not aware of any case in which any court has decided, in the context of a motion for summary judgment based on qualified immunity, to apply the standard proposed by Petitioner, namely, the standard applicable to motions to dismiss for failure to state a claim. There is simply no authority to support Petitioner's quixotic effort to exempt civil rights claims from the normal federal summary judgment practice.

Fourth, Petitioner attempts to create a conflict among the circuits in regard to qualified immunity by misrepresenting the Fifth Circuit's opinion. Petitioner falsely claims that the Fifth Circuit used a three-step sequence in deciding qualified immunity, rather than the two-step sequence adopted by this Court. While the Fifth Circuit mentioned that, in the past, it had sometimes used a three-step sequence for qualified immunity, it specifically noted in this case that it was

not following those earlier Fifth Circuit precedents and instead was adhering to this Court's more recent qualified immunity decisions.

The Fifth Circuit's decision, both on the Fourth Amendment and qualified immunity, is in line with the precedents of this Court and of the other federal courts of appeals. Petitioner cannot change the unremarkable nature of the Fifth Circuit's decision through his misrepresentations of the facts and lower court opinions. Moreover, the Fifth Circuit's decision has even less significance because it has no precedential effect and, even assuming it was reversed, Officer Quiles would still be entitled to summary judgment because a neutral magistrate issued the warrant. Officer Quiles disclosed to a magistrate all of the relevant evidence in Officer Quiles' knowledge at the time and the magistrate issued an arrest warrant.

The petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Background.

1. Quinn and his former wife, Laurie Houston, divorced in 1991. Quinn was awarded custody of their two children, but one of them, Quinn's daughter Katie, went to live with Houston at some point. On July 15, 2004, Katie, who was sixteen at the time,

told her mother that Quinn had been sexually abusing her since she was eight years old. Earlier that day, Katie had been arrested for shoplifting. While Katie and her mother were discussing Katie's arrest, Katie alleged that she had been abused by Quinn. This allegation was made in conjunction with Katie's attempted suicide. After that, Katie was taken to the hospital. *See* App. 5.

2. At the hospital, Nurse Joy Turner performed an admission assessment on Katie. During the assessment, Katie stated that Quinn had sexually abused her beginning when she was eight years old and ending when she was twelve. Nurse Turner reported the allegations of abuse to the Texas Department of Family and Protective Services, Child Protective Services Division (CPS). On July 21, 2004, Dawn Todd of the Denton County Children's Advocacy Center conducted a videotaped interview with Katie. In the interview, Katie stated that her father had engaged in sexual intercourse with her on two separate occasions, once when she was eight years old and once when she was nine or ten years old. *See* App. 5-6.

3. On July 30, 2004, Officer Quiles received a written notification of the alleged abuse from CPS (the CPS intake report) and a copy of the videotaped interview conducted by Todd. Quiles viewed the videotape of the interview on August 9, 2004. On August 12, Laurie Houston met with Quiles and provided Quiles with a written statement regarding the events of July 15, 2004, including Katie's claim

that Quinn had been sexually abusing her since she was eight years old. Houston also stated that Quinn was an alcoholic and a flight and suicide risk. *See* App. 6.

4. On the same date, Quiles asked Houston to provide him with a copy of Katie's medical records. On August 31, 2004, Beth Hudson, a registered nurse, performed a Sexual Assault Nurse Examiner (SANE) examination on Katie. *See* App. 6.

5. On September 2, 2004, Quiles received an affidavit from Joy Turner, the nurse who had performed the admission assessment on Katie at the hospital, recounting Katie's statements to her that her father had abused her from ages eight to twelve. *See* App. 6-7.

6. Based on the videotaped interview of Katie, Turner's affidavit, Houston's written and oral statements, and the CPS intake report, Quiles executed a probable cause affidavit on September 8, 2004, for Quinn's arrest. The next day, a warrant was issued for Quinn's arrest for the felony criminal offense of aggravated sexual assault of a child. Quinn was arrested by the McKinney Police Department on September 12, 2004. Quiles was not present at the arrest. Quiles was not aware of the results of the SANE examination until after Quinn's arrest. The examination revealed that Katie had a hymen tear, indicating some form of physical trauma. The report did not indicate the cause of the tear or when it had occurred. *See* App. 7.

7. After the criminal case against Quinn was dismissed, Quinn sued Officer Quiles and the City of McKinney ("the City") (jointly, "the City Defendants") under 42 U.S.C. § 1983 for allegedly violating Quinn's right to be free from unreasonable seizures under the Fourth Amendment.[1] *See* App. 3. The City Defendants filed a motion to dismiss all claims under Federal Rule of Civil Procedure 12(b)(6) and Officer Quiles also filed a motion for summary judgment. *Id.* The district court adopted the report and recommendation of the magistrate, dismissing all of Quinn's claims against the City and granting summary judgment to Officer Quiles. *See* App. 4. Quinn appealed to the Fifth Circuit on some of his claims and the court of appeals affirmed the decision of the district court. *See* App. 1. Quinn sought rehearing *en banc*, but none of the Fifth Circuit judges requested the case be considered for rehearing. *See* App. 45. Quinn now seeks review of the Fifth Circuit's decision which affirmed that Officer Quiles is entitled to qualified immunity from Quinn's Fourth Amendment claim. *See* Pet. Br. i.[2]

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[1] Quinn also brought claims against Officer Quiles and the City for alleged violations of his right to due process and equal protection under the Fifth and Fourteenth Amendments, for malicious prosecution under state and federal law, and for false arrest and imprisonment and various forms of negligence under state law. *See* App. 3. Quinn has not sought review on any of these other claims.

[2] Quinn also seeks review of certain claims against the Collin County district attorneys. *See* Pet. Br. i-ii. Quinn's claims

(Continued on following page)

B. Petitioner Misrepresents the Facts of the Case.

1. Petitioner misleadingly states, "It is undisputed that the only evidence the police had in their possession before applying for the arrest warrant was the uncorroborated outcry of Katie, made on the day she was arrested for shoplifting and while attempting suicide, eight years after the alleged assault supposedly occurred." Pet. Br. i. Petitioner's statement implies that the police relied solely on an allegation made in the midst of a suicide attempt. *See id.* at 4 ("whose outcry was made on the same day she was arrested for shoplifting and while she was so distraught"). This is false and misleading. Katie's statement during her suicide attempt was the first time she told her mother that Petitioner sexually assaulted her. *See* App. 5. That statement was followed up by consistent statements to independent interviewers, including Joy Turner, the nurse who performed an admission assessment on Katie on the day of the suicide attempt and Dawn Todd of the Denton County Children's Advocacy Center. *See* App. 5-6. Officer Quiles did not rely solely on the statements of Laurie Houston, or even the statements of Turner and Todd. Officer Quiles reviewed those

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relating to the alleged delay in prosecution do not relate to Officer Quiles or the City.

materials, but he also viewed the videotape of Todd's interview with Katie. *See* App. 6-7.[3]

2. Petitioner states, "the Fifth Circuit also incorrectly stated that Quinn did not produce any evidence of unconstitutional conduct. Actually, Quinn produced the *only* such evidence in the entire case: the affidavit of Melvin Tucker." Pet. Br. 11 n.5. Petitioner's statement is false and misleading. First, Melvin Tucker's affidavit was rejected for various reasons, including the fact that Tucker relied on evidence discovered after the arrest to explain why Tucker believed that there was no probable cause to arrest Quinn. *See* S. App. 23.[4] Second, the Fifth Circuit noted that Quinn failed to present evidence challenging Officer Quiles' assertion that he was unaware of the allegedly exculpatory evidence when he signed the probable cause affidavit. *See* App. 14 and 17; *see also* S. App. 23. As the Fifth Circuit explained, it was not objectively unreasonable "for Quiles to have believed that probable cause existed in light of the detailed nature of Katie's allegations and the fact that Quiles did not possess evidence at the

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[3] Katie has consistently maintained that Petitioner sexually assaulted her. No subsequent interviews have changed her testimony on the essential facts of her allegation of rape.

[4] The magistrate explained, "Tucker's affidavit, as noted by Defendants, assumes that Quiles knew facts that Quiles has stated, under oath, that he did not [know] at the time he submitted the affidavit for the warrant. Therefore, Tucker's affidavit has little effect on this analysis." S. App. 23.

time that Katie may have had a motive to fabricate the allegations." App. 13.

3. Petitioner states, "Defendant Quiles admitted that all he had to go on to suspect this crime had been committed was the uncorroborated story of an informant of unknown reliability, a story completely unsupported by any physical evidence." Pet. Br. 21. Petitioner's statement is misleading in two respects. First, it is misleading to refer to Katie as merely "an informant." In the terminology of the federal courts, Katie was a victim eyewitness. The courts, including this one, have recognized the difference between informants in general and eyewitnesses, especially the victim of a crime. Second, Petitioner emphasizes that Katie's story was unsupported by any physical evidence. That there might be no physical evidence is not surprising. The alleged rape occurred many years before and Katie had been sexually active since that time. *See* App. 16. Significantly, while Officer Quiles did not have physical evidence at the time he signed the probable cause affidavit, the medical report from the SANE examiner did lend support to Katie's allegations of sexual trauma. *See* App. 7; S. App. 23.

4. Petitioner states, "He also admitted that hearing a story (even three different versions of the same story) may be enough for reasonable suspicion and thus trigger an investigation, but it does not provide probable cause sufficient to support an arrest." Pet. Br. 21. Petitioner then states, in a footnote, "Somehow, Officer Quiles then decided that hearing

the same story a fourth time pushed him from reasonable suspicion to probable cause. . . . Even the Fifth Circuit was critical of Quiles on this point." *Id.* at 21 n.12. Petitioner's statements are false and misleading. First, Officer Quiles did not state that hearing a story (*e.g.*, of an eyewitness or victim eyewitness) cannot provide probable cause to support an arrest. The deposition pages cited by Petitioner and included in Petitioner's appendix do not support Petitioner's claim. Second, Officer Quiles did not state that merely "hearing the story a fourth time" created probable cause. Officer Quiles explained that he had reasonable suspicion after he had reviewed the written statements from the individuals who interviewed Katie, but that he had probable cause when he reviewed Katie's statement on the videotaped interview. *See* App. 55-64. Third, the Fifth Circuit did not criticize Officer Quiles for believing there was probable cause. The Fifth Circuit did note that it would have been better if Officer Quiles could have found some way to personally interview Quinn and Katie, but the court was careful to note "we do not believe that it was objectively unreasonable to believe that probable cause existed without interviewing Quiles and Houston [sic]." App. 15 n.4.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT AN IMPORTANT LEGAL ISSUE ON WHICH THERE IS CONFLICTING AUTHORITY.

A. The Courts Uniformly Agree that the Testimony of Victim Eyewitnesses Is Generally Sufficient to Establish Probable Cause to Arrest.

Petitioner proposes the novel theory that the testimony of an alleged rape victim, a victim eyewitness, is insufficient to establish probable cause for an arrest of the alleged rapist. In Petitioner's world, crimes that have only two eyewitnesses – the perpetrator and the victim – would frequently be impossible to investigate and prosecute. Petitioner proposes that, as a matter of law, the testimony of a victim eyewitness, such as a victim of rape, cannot, on its own, suffice to establish probable cause. Petitioner's proposed interpretation of the Fourth Amendment is contrary to the long-standing precedents of the federal courts throughout the United States and would leave many victims of sexual assault without recourse or protection.

The general rule in courts throughout the United States is that the testimony from the alleged victim of a crime is ordinarily sufficient to establish probable cause. *See, e.g., Acosta v. Ames Dep't Stores, Inc.*, 386 F.3d 5, 10 (1st Cir. 2004) ("The uncorroborated testimony of a victim or other percipient witness, standing alone, ordinarily can support a finding of

probable cause."); *Sharrar v. Felsing*, 128 F.3d 810, 818 (3d Cir. 1997) ("When a police officer has received a reliable identification by a victim of his or her attacker, the police have probable cause to arrest."); *United States v. Shaw*, 464 F.3d 615, 623 (6th Cir. 2006) ("An eye witness's statement that he or she saw a crime committed or was the victim of a crime is generally sufficient to establish probable cause."); *Reynolds v. Jamison*, 488 F.3d 756, 765 (7th Cir. 2007) ("We have repeatedly held that a complaint of the putative victim or single witness is generally sufficient to establish probable cause, unless the officer has a reason to question the witness' account."); *Clay v. Conlee*, 815 F.2d 1164, 1168 (8th Cir. 1987) ("Clearly, law enforcement officers are entitled to rely on information supplied by the victim of a crime, absent some indication that the information is not reasonably trustworthy or reliable.").[5] As this Court has pointed out,

> [E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed

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[5] *See also Schramm v. State*, 648 S.E.2d 392, 395 (Ga. Ct. App. 2007) ("testimony of a single witness is sufficient to establish a fact"); *Glover v. State*, 102 S.W.3d 754, 759 (Tex. App. – Texarkana 2002, pet. ref'd) ("One witness providing circumstantial evidence of each element satisfies the State's burden with respect to legal sufficiency."); *Messenger v. State*, 2008 Tex. App. LEXIS 4357, 7 (Tex. App. – Fort Worth 2008, no pet.) ("despite the lack of physical evidence, M.H. provided sufficient testimony, [by stating that the assailant had intercourse with her without her consent,] to show that a sexual assault had occurred.").

> description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case.

Illinois v. Gates, 462 U.S. 213, 234 (1983).

Quinn, however, attempts to confuse the issue by arguing that the testimony of victims of sexual assault should be subject to the higher level of scrutiny sometimes applied to unknown informants. *See, e.g., Easton v. City of Boulder*, 776 F.2d 1441, 1449 (10th Cir. 1985) ("the skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim or ordinary citizen witness."); *Caldarola v. Calabrese*, 298 F.3d 156, 165 (2d Cir. 2002). In support of his new restriction on the ability of police officers to investigate sexual assaults, Quinn cites two cases: *Hale v. Fish*, 899 F.2d 390 (5th Cir. 1990), and *Ripson v. Alles*, 21 F.3d 805 (8th Cir. 1994). Quinn's reliance on *Hale* and *Ripson* highlights why there is no issue in this case worth reviewing.

First, *Hale* is a published Fifth Circuit case, whereas the decision in the case at bar is an unpublished Fifth Circuit case. Even assuming, *arguendo*, that *Hale* and the Fifth Circuit's decision in this case conflict, this Court should wait for the Fifth Circuit to resolve the conflict among its own precedents. Restraint makes even more sense in the context of this case since the decision in the case at bar is an

unpublished opinion that has no precedential authority within the Fifth Circuit. *See* 5TH CIR. R. 47.5.4 (unpublished opinions are not precedent). Petitioner contends that *Hale* represents the correct statement of the law. The Fifth Circuit's decision in the case at bar, even assuming it contradicts *Hale*, does not change that *Hale*, and not the decision in this case, is binding precedent within the Fifth Circuit.

Second, *Hale* does not conflict with the Fifth Circuit's decision in the case at bar. *Hale* was an unusual case, involving an extensive investigation into allegations that individuals acting on behalf of the Federal Bureau of Investigation (FBI) had kidnapped a parolee on the pretense of seeking his assistance for an on-going FBI investigation of alleged corruption in the Bossier County District Attorney's Office. *See* 899 F.2d at 392-98. The local sheriff's office sought and received a warrant for the arrest of the alleged kidnappers based on "false and misleading statements, as well as material omissions relevant to the probable cause determination." *Id.* at 398. In essence, the testifying officers had conducted an extensive investigation into the kidnapping allegation by the parolee and had found no evidence to support the claim and a considerable amount of evidence calling into doubt the parolee's story. *Id.* at 399-400. The Court noted that the parolee "had ample motive to lie [because he] was being prosecuted by the Bossier County District Attorney's Office, the subject of the alleged kidnappers' investigation." *Id.* at 399. In light of the overwhelming evidence available to the

arresting officers undercutting the reliability of the parolee's testimony, his statement was "lacking in the usual reliability given victim eyewitnesses." *Id.*; *see also id.* (it is "generally true" that no evidence of veracity is necessary to establish probable cause if the witness is a "victim eyewitness").

Hale, like the decision in the case at bar, and in accord with precedent throughout the United States, held that the testimony of a victim eyewitness is generally sufficient to establish probable cause for an arrest. *Hale*, 899 F.2d at 399; App. 13-14. While the testimony of a victim eyewitness is not sufficient when "the witness has a motivation to lie, or there is some other indication that the information is not reliable," *Hale*, 899 F.2d at 399, the general rule is that the testimony of victim eyewitnesses can support probable cause. The undisputed summary judgment evidence in the case at bar is that, at the time he signed the probable cause affidavit, Officer Quiles did not know of any evidence suggesting that Katie might have had a motive to lie about the alleged rape. *See* App. 14.

Finally, *Ripson* is distinguishable from the case at bar in three important respects. First, *Ripson* did not involve the testimony of a victim eyewitness. The testimony in *Ripson* was from Melody, Ripson's estranged wife, and from Melody's live-in boyfriend. They were the non-victim, non-eyewitnesses who reported to the police their belief that Ripson had sexually abused his two-year-old daughter. *See* 21 F.3d at 806.

Second, in *Ripson*, the officer knew that Mr. Ripson and his estranged wife, Melody, were involved in a custody dispute over their daughter. *Id.* at 808. In the case at bar, Officer Quiles had no such similar knowledge which would call into question the credibility of Petitioner's daughter. Officer Quiles had no prior knowledge of any allegedly bitter divorce or custody battle between Petitioner and Houston.

Third, in *Ripson*, the County Attorney had advised the officer to "keep investigating." The County Attorney in *Ripson* was surprised to learn that Mr. Ripson had been arrested by the officers a mere 12 hours after the County Attorney had told the officers to "keep investigating." *Id.* at 807. No such similar circumstance exists in the case at bar.

Assistant Police Chief Alles arrested Ripson based on the testimony of Melody and her live-in boyfriend, despite the lack of medical evidence and despite his knowledge that Melody and Ripson were currently engaged in a custody dispute. *Id.* at 808. In summary, *Ripson* did not involve the testimony of any victim eyewitnesses and the arresting officer in *Ripson* had reason to doubt the veracity of Melody's and her live-in boyfriend's testimony due to the custody dispute. In contrast, this case involves the testimony of a victim eyewitness, Petitioner's daughter, who repeatedly provided detailed statements about how Petitioner had raped her on two occasions. Moreover, while Petitioner alleges that there was an ongoing child support dispute that calls into question his daughter's veracity, it is undisputed that Officer

Quiles was unaware of the child support dispute until after the arrest. *See* App. 14.

B. There Is No Important Issue in this Case: Petitioner Simply Failed to Set Forth Evidence in Response to Officer Quiles' Motion for Summary Judgment.

1. Petitioner Misguidedly Contends that a Civil Rights Plaintiff Is Not Required to Provide Evidence in Response to a Motion for Summary Judgment Based on Qualified Immunity.

Petitioner's argument, at its core, is that he should not have been required to provide evidence in response to Officer Quiles' motion for summary judgment based on qualified immunity. Petitioner contends that the lower courts should have assumed the facts as alleged in Petitioner's complaint. *See* Pet. Br. 9 and n.3.[6] Petitioner's argument is without merit and without precedent.

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[6] Petitioner describes the first prong of the qualified immunity analysis as whether "the plaintiff's complaint properly allege[s] violation of a Constitutional right." Pet. Br. 9. Petitioner further explains that "[t]his is the same question addressed in a motion to dismiss under FRCP 12(b)(6)." Pet. Br. 9 n.3; *see also* Pet. Br. 2 ("The first question is similar to the standard under FRCP 12(b)(6) and asks whether the plaintiff has pleaded sufficiently to support a cause of action for violation

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Public officials are entitled to assert qualified immunity under *both* Federal Rule of Civil Procedure 12 in a motion to dismiss *and* Rule 56 in a motion for summary judgment. *See Behrens v. Pelletier*, 516 U.S. 299, 306-08 (1996); *see also Pearson v. Callahan*, ___ U.S. ___, 129 S. Ct. 808, 815-16 (2009).

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).[7]

In order to overcome the assertion of qualified immunity in a motion to dismiss, the facts that a civil

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of his constitutional rights."); *id.* at 13 ("The proper inquiry for qualified immunity only asks whether the state of the law is such that an officer of reasonable competence would know that what the plaintiff *has accused* the defendant of doing is unconstitutional."); *id.* at 15 ("whether the plaintiff has fulfilled prong 1 by *pleading* facts supporting a viable cause of action").

[7] This Court recently noted in *Pearson* that the first prong of qualified immunity analysis is "whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right." 129 S. Ct. 815-16.

rights plaintiff has alleged must make out a violation of a constitutional right. *Pearson*, 129 S. Ct. at 815-16; *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 and 1953-54 (2009) (applying normal Rule 12(b)(6) standard to motions to dismiss based on qualified immunity). In order to overcome the assertion of qualified immunity in a motion for summary judgment, the facts that a civil rights plaintiff has shown must make out a violation of a constitutional right. *Pearson*, 129 S. Ct. at 815-16. As this Court explained in *Behrens*, "On summary judgment, however, the plaintiff can no longer rest on the pleadings, see Fed. Rule Civil Proc. 56, and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* [*v. Fitzgerald*, 457 U.S. 800 (1982)] inquiry." 516 U.S. at 309.

Petitioner, however, proposes that the Fifth Circuit is a rogue court of appeals because it expected Petitioner to provide evidence in response to Officer Quiles' motion for summary judgment. *See* Pet. Br. 2, 9 and 13; *see also* App. 17 ("Quinn has failed to present any competent summary judgment evidence that Quiles withheld relevant evidence from the magistrate judge."); *id.* at 14 ("there is no evidence");[8] *id.* at 16 ("there is no evidence").

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[8] The Fifth Circuit writes, "Katie's vested interest in the child support dispute between Quinn and Laurie Houston raises a more serious question about her reliability, but there is no evidence that Quiles was aware of the dispute at the time of the

(Continued on following page)

Officer Quiles moved for summary judgment based on qualified immunity. *See* App. 3 In response, Petitioner was required to "set out specific facts showing a genuine issue for trial." FED. R. CIV. P. 56(e)(2). Petitioner's lack of evidence or failure to provide that evidence to the district court is not a basis for requesting that this Court review the Fifth Circuit's decision. There is no new, novel or conflicting issue in this case. A plaintiff responding to a motion for summary judgment must fulfill his obligation to respond under Rule 56. That obligation to respond exists even if the plaintiff alleges civil rights violations and even if the defendant asserts qualified immunity. Petitioner failed to provide competent summary judgment evidence on the question of whether Officer Quiles knew about any of the alleged exculpatory evidence when he signed the probable cause affidavit. Petitioner failed to show that there was a fact question for the jury and, as a result, the district court and Fifth Circuit held that Officer Quiles was entitled to summary judgment.

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arrest. There is no evidence that Quinn [sic] disregarded any exculpatory evidence at the time of the arrest." App. 14. While the second sentence quoted refers to Petitioner Quinn, it is clear from the context that the Fifth Circuit intended to state that there is no evidence that Officer Quiles disregarded any exculpatory evidence at the time of the arrest.

2. Petitioner Attempts to Limit the Qualified Immunity Defense to the Pleadings and Prohibit the Use of the Defense Based on the Facts.

Petitioner erroneously claims that the qualified immunity defense is limited to analysis of the pleadings and is not available as a defense based on the evidence developed during discovery or at trial. Petitioner states,

> [T]he proper legal inquiry for qualified immunity purposes does not consider whether the defendant's conduct was or was not factually or "objectively" reasonable. The *proper* inquiry for qualified immunity only asks whether the state of the law is such that an officer of reasonable competence would know that what the plaintiff has accused the defendant of doing is unconstitutional.

Pet. Br. 13 (emphasis in original).

Petitioner's novel interpretation of qualified immunity conflicts with this Court's precedents in *Mitchell*, *Behrens*, and *Pearson*. As shown above, this Court has consistently held that a civil rights plaintiff, like any other plaintiff, is required to provide evidence that creates a fact question in order to overcome a motion for summary judgment and proceed to trial. At the summary judgment stage, the plaintiff can no longer rest on the pleadings. *Behrens*, 516 U.S. at 309.

While Quinn's petition for writ of certiorari is muddled in its arguments, it appears that Petitioner may be confusing reasonableness under the Fourth Amendment with reasonableness under qualified immunity. Quinn would not be the first to make this mistake. *See Saucier v. Katz*, 533 U.S. 194, 197 (2001) (holding that Ninth Circuit erroneously combined Fourth Amendment reasonableness with qualified immunity reasonableness). However, Quinn's mistake was resolved by this Court in *Saucier* and *Brosseau v. Haugen*, 543 U.S. 194 (2004), when this Court held that whether a police officer acted reasonably in light of clearly established law is a separate inquiry from whether the officer's use of force was reasonable under the circumstances. Even assuming the officer's use of force was unreasonable, the officer can still be entitled to qualified immunity if he could have reasonably believed that his use of force was reasonable in light of clearly established law. *Saucier*, 533 U.S. at 202; *Brosseau*, 543 U.S. at 198-99.

As in *Saucier* and *Brosseau*, there are two reasonableness inquiries in this case: (1) whether the facts and circumstances known to the officer could justify a reasonably prudent police officer to believe that the suspect committed an offense, *see Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979); and (2) whether the officer's conduct was objectively reasonable in light of the legal rules that were clearly established at the time it was taken. *Pearson*, 129 S. Ct. at 822. As this Court explained in *Saucier*, the general Fourth Amendment requirement of reasonableness

does not clearly establish that all actions that are unreasonable under the Fourth Amendment are clearly established for purposes of qualified immunity. 533 U.S. at 201-02; *see also Brosseau*, 543 U.S. at 198-99.

The Fifth Circuit followed the direction of this Court and considered Fourth Amendment reasonableness and qualified immunity reasonableness as separate inquiries. The Fifth Circuit chose not to decide the Fourth Amendment reasonableness issue because the qualified immunity reasonableness issue was fairly straightforward. *Cf. Pearson*, 129 S. Ct. at 820 (providing reasons for deciding qualified immunity on the clearly established prong without deciding whether there was a constitutional violation). The testimony of victim eyewitnesses is generally sufficient to establish probable cause and there was no evidence that Officer Quiles had evidence calling into serious question Katie's allegations against Quinn. While Petitioner is confused about qualified immunity, the courts of appeals are not. There is no issue worthy of review in Petitioner's clai ns against Officer Quiles.

C. Petitioner Misrepresents the Fifth Circuit's Application of Qualified Immunity in a Vain Attempt to Create the Illusion of a Conflict with Prior Precedent.

Petitioner misrepresents the Fifth Circuit's qualified immunity analysis and twists statements out of

context in a vain attempt to create the illusion of a conflict between the Fifth Circuit's decision and other precedents. Petitioner alleges that the Fifth Circuit "failed to follow this Court's settled rules related to qualified immunity." Pet. Br. 5. Petitioner claims that the ruling below "is in direct conflict with every qualified immunity decision ever made by this Court and with the decisions of every other circuit court of appeals that has addressed the same issues." *Id.* Moreover, Petitioner states that this Court's "recent efforts to clarify the qualified immunity decision-making process have seemingly fallen on deaf ears in the Fifth Circuit." Pet. Br. 10. The Fifth Circuit supposedly "completely ignores the proper methodology found in this Court's case law." *Id.* The principal flaw in Petitioner's allegations, however, is that they are false. What Petitioner lacks in accuracy and honesty, he attempts to make up with bravado and strong rhetoric. Petitioner fails to accurately describe this Court's qualified immunity precedents, as well as the Fifth Circuit's decision in the case at bar. Petitioner's description of qualified immunity analysis is not grounded in this Court's precedent. But regardless, Petitioner's description of the Fifth Circuit's decision is so inaccurate and misleading as to make it particularly difficult to determine what aspect of the actual opinion Petitioner wants this Court to review.

1. Even a Cursory Glance at the Fifth Circuit's Qualified Immunity Analysis Demonstrates that it Relies on this Court's Recent Precedents.

Petitioner claims that the Fifth Circuit, "as a matter of practice, completely ignores the proper methodology found in this Court's case law" regarding qualified immunity. Pet. Br. 10. A quick comparison, however, of the qualified immunity standard as enunciated by the Fifth Circuit in this case compared with this Court's recent decision in *Pearson* helps to illustrate Petitioner's quixotic approach to qualified immunity. In *Pearson*, this Court explained,

> In *Saucier*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272, this Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. 533 U.S., at 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Ibid.* Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Anderson* [*v. Creighton*, 483 U.S. 635, 640 (1987)].

Id. at 815-16.

In this case, the Fifth Circuit described the same two-step sequence as follows:

> In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court mandated a two-step sequence for resolving government officials' qualified immunity claims: first, a court must decide whether the facts alleged or shown are sufficient to make out a violation of a constitutional right; second, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. If the official's conduct violated a clearly established right, then qualified immunity is not applicable.

App. 8-9.

While the Fifth Circuit's enunciation of qualified immunity in this case is drawn almost verbatim from this Court's recent opinion in *Pearson*, Petitioner proposes that the two-step sequence should be described as follows:

Prong 1. Does the plaintiff's complaint properly allege violation of a Constitutional right?

Prong 2. Was the law, at the time of the official's conduct, clearly established enough to give the defendant "fair warning" that the conduct he is accused of taking violated Plaintiff's Constitutional rights?

Pet. Br. 9 (citing *Saucier*, 533 U.S. at 201-03; *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002)). Petitioner's two-step sequence is not the standard enunciated by this Court. While Petitioner claims that this Court's "recent efforts to clarify the qualified immunity decision-making process have seemingly fallen on deaf ears in the Fifth Circuit," it is the Fifth Circuit's description of the two-step sequence that conforms to this Court's 2009 decision in *Pearson*.

2. The Fifth Circuit Specifically Rejected the Alleged Error Petitioner Claims Is Readily Apparent in the Fifth Circuit's Decision.

Petitioner falsely alleges that the Fifth Circuit erred by using a "unique and erroneous methodology" involving two sub-parts in the second (clearly established) prong of the qualified immunity analysis. *See* Pet. Br. 10. In support of Petitioner's misleading claim, Petitioner selectively quotes from the following *footnote* in the Fifth Circuit's decision:

> This circuit has at times characterized its approach in qualified immunity cases as a three-pronged inquiry in which the traditional second prong is divided into two separate and distinct inquiries: whether the right was clearly established and whether the officer's conduct was objectively reasonable. *The Supreme Court's recent case law makes it clear that these inquiries are more appropriately viewed not as separate and*

> *distinct, but as two sides of the same analytical coin.*

App. 10 n.2 (citations removed).[9] Petitioner leaves out the last sentence of the quote; the sentence in which the Fifth Circuit panel indicates that it is modifying its approach to qualified immunity in order to *avoid* dividing the second prong into sub-parts. Petitioner, however, proposes that it is "readily apparent" that the Fifth Circuit erred by dividing the second prong into two sub-parts. *See* Pet. Br. 10. Once again, it is clear that it is the Fifth Circuit that is working to conform its analysis to that of this Court while Petitioner is tilting at windmills.

II. THE OUTCOME OF THIS APPEAL HAS NO PRECEDENTIAL EFFECT AND WOULD NOT AFFECT THE OUTCOME OF THIS LITIGATION.

A. The Fifth Circuit's Decision is Unpublished and has No Precedential Effect.

Petitioner claims that the Fifth Circuit's decision "confuses the law [and] leaves future courts with a decision they could 'follow' potentially leading to even

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[9] This Court recently explained that the second or clearly established prong "turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Pearson*, 129 S. Ct. at 822 (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)).

more erroneous decisions on this important Constitutional issue." Pet. Br. 6. As shown already, it is Petitioner who has confused the law, not the Fifth Circuit. However, even assuming the Fifth Circuit had confused the law, this case would not be a good decision from which to clarify the law of qualified immunity.

First, much of the Fifth Circuit's decision turns on the fact that Petitioner failed to present summary judgment evidence sufficient to establish a fact question as to whether Officer Quiles knew of the allegedly exculpatory facts when he signed the probable cause affidavit. As a result, the decision is fact-bound and unlikely to have an effect on later decisions.

Second, the decision is unpublished. *See* App. 2 n.*. In the Fifth Circuit, unpublished decisions "are not precedent, except under the doctrine of *res judicata*, *collateral estoppel*, or law of the case." 5TH CIR. R. 47.5.4. The only parties that the Fifth Circuit's decision is going affect are the parties to the decision – Petitioner and the various respondents. There is no reason to review this case.

B. Reversal of the Fifth Circuit's Decision Would Not Affect the Outcome of the Case Because a Neutral Magistrate Issued the Arrest Warrant.

Petitioner would not benefit from reversal of the Fifth Circuit's decision because Officer Quiles' probable cause affidavit was reviewed by a neutral and

detached magistrate and the magistrate issued the arrest warrant. *Cf. Gates*, 462 U.S. at 236-37.[10] Even assuming this Court reversed the decision of the Fifth Circuit, Officer Quiles would still be entitled to summary judgment because the warrant issued by the magistrate constitutes an independent justification for the arrest that cuts off any liability on the part of Officer Quiles unless he concealed evidence. *See Malley v. Briggs*, 475 U.S. 335, 344-45 (1986) ("Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the shield of immunity be lost."); *see also* App. 7. As the Fifth Circuit explained, and Quinn has not challenged in his petition, "Quinn has failed to present any competent summary judgment evidence that Quiles withheld relevant evidence from the magistrate judge." App. 17. Quinn argued on appeal before the Fifth Circuit that the court of appeals should reverse the decision of the district court because Officer Quiles allegedly violated the Fifth and Fourteenth Amendments by engaging in judicial deception when applying for the warrant. *See* App. 11. The Fifth Circuit affirmed the decision of the district court entering summary

[10] *See also Massachusetts v. Sheppard*, 468 U.S. 981, 990 (1984) (officer entitled to rely on warrant); *Groh v. Ramirez*, 540 U.S. 551, 564 (2004) (officer not entitled to rely on warrant because defect is apparent on face of warrant).

judgment on Quinn's Fifth and Fourteenth Amendment claims. *See* App. 17. Quinn has not sought review of that portion of the Fifth Circuit's decision. Since the Fifth Circuit affirmed the holding that Quiles did not withhold relevant evidence from the magistrate judge, the warrant issued by the magistrate forecloses Petitioner's Fourth Amendment claim against Officer Quiles. This case does not raise any important issues as to Fourth Amendment jurisprudence, qualified immunity jurisprudence or even the merits of this litigation.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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